IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-949

JUNIOR ERNEST GIBSON,
Petitioner,

v.

STATE OF MISSOURI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Missouri Court of Appeals

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The Petitioner, Junior Ernest Gibson, prays that a Writ of Certiorari issue to review the judgment of the Missouri Court of Appeals, Springfield District, entered in the above case on August 5, 1976.

OPINION BELOW

The opinion of the Missouri Court of Appeals, Springfield District, is, as yet, unpublished, but is appended hereto as Appendix A.

JURISDICTION

The judgment of the Missouri Court of Appeals, Springfield District, was entered on August 5, 1976. A timely petition for rehearing by the Missouri Court of Appeals, Springfield District, or in the alternative for transfer to the Missouri Supreme Court was denied on September 1, 1976. A timely application to transfer to the Missouri Supreme Court was denied by the Missouri Supreme Court on October 12, 1976 and this Petition for Certiorari was filed within, 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether the prosecuting attorney's closing argument, *in toto*, denied the petitioner his constitutional rights to a fair trial under the Sixth Amendment and to due process and equal protection of the law under the Fourteenth Amendment?

2. Whether the denial of the constitutional rights of due process and a fair trial in the trial below affected substantial rights of this petitioner thereby requiring review on appeal under the doctrine of "plain error"?

STATEMENT

A. Summary of trial record and closing argument.

The petitioner was charged with the second degree murder of Buster Harrison Farrell and the second degree murder of Bobbie Gene Hopkins. By stipulation of the parties, both causes were consolidated and tried jointly. Both of these cases stem from an incident which occurred on May 18, 1970 in which

the petitioner shot both individuals while they were in the company of his estranged wife. The petitioner testified at his trial that he shot both men in self-defense.

In his closing argument which is appended hereto in full as Appendix B, the prosecuting attorney made the following remarks[1] to the jury:

1) He improperly argued that if the victims were alive they would testify differently than petitioner (Tr. 466, 469-470);

2) He improperly argued his personal opinion regarding the guilt of the petitioner (Tr. 475-476, 500-501);

3) He improperly argued that if the jury acquitted the petitioner, they would be condoning his actions and subjecting the public to great dangers (Tr. 466-467);

4) He improperly argued petitioner's unsubstantiated prior crimes and misconduct to show a propensity to commit the present crime (Tr. 473-474, 475, 479, 508-509);

5) He improperly argued matters of character which were irrelevant and which were not supported by the evidence pertaining, *inter alia*, to defendant's relationship with his wife (Tr. 470-471, 510);

6) He improperly implied the guilt of petitioner because he had retained a particular counsel from Illinois (Tr. 408, 468, 501-502, 504-505, 508);

7) He improperly referred to petitioner's affluence and economic status to prejudice petitioner in the eyes of the jury (Tr. 468);[2]

---

[1] Petitioner referred specifically to the first six instances of prosecutorial misconduct in his brief to the Missouri Court of Appeals. But appended the entire argument thereto and alleged error by reason of its overall tone. This Court is earnestly urged to read the entire argument set out in Appendix B so as to be able to appreciate its overall tone and impact.

[2] See, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1939); *State v. Spencer*, 307 S.W. 2d 440 (Mo. 1957).

8) He improperly called the jury's attention to the petitioner's failure to testify at the preliminary hearing (Tr. 503-504).[3]

However, of the eight different instances of improper argument referred to above, the petitioner's defense counsel[4] made objections to only three of them during the trial.

B. **Conviction and Sentence**

The jury subsequently returned a verdict of second degree murder with regard to the death of Bobbie Gene Hopkins and a verdict of manslaughter with regard to the death of Buster Farrell. The jury thereafter assessed punishment at ten years on the murder charge and the Court assessed punishment at ten years on the manslaughter charge.

C. **Preservation of Error**

After objecting to the instances of prejudicial argument numbered four, six and eight, supra, the petitioner's trial counsel in an effort to again call this matter to the trial court's attention cited *inter alia*, the following grounds in the motion for a new trial:

> "2. That the verdicts are the result of passionate prejudice on the part of the jury as a result of hereinafter described inflammatory remarks made by the prosecuting lawyer during final argument.
>
> 13. Further, this Defendant was then confronted with the argument made twice by the State's attorney, to the effect

[3] See, *Deats v. Rodriguez*, 477 F. 2d 1023 (10th Cir. 1973).

[4] Present counsel was retained after the trial for purposes of appeal.

> that the Defendant's counsel was from Illinois, and that, thereby, in effect, Defendant could not find a lawyer in St. Louis or one of the larger cities of Missouri to represent him; and, in effect, that should make a difference in their verdicts thus severely prejudicing him and arousing unnecessary passions and prejudice about a subject matter that was not an issue in the case.
>
> 21. That the State's Attorney committed reversible error in arguing to the jury that the prior conviction of assaulting a woman in Illinois, which occurred after his arrest on this charge, showed his propensity for the crime; and, although objection was thereafter sustained by the Court to this argument, the Defendant was greatly prejudiced thereby when the State's Attorney reaffirmed in his argument that it affected his credibility and talked about the said offense."

With respect to his several arguments regarding the impropriety of the prosecutor's closing argument, the petitioner in his brief to the Missouri Court of Appeals stated:

> "In view of the specific improper prejudicial and highly inflammable comments set out above, as well as the overall tone of the prosecutor's argument, it is submitted that defendant was denied his right to a fair and impartial trial and that the conviction should, therefore, be reversed."

After this appeal by present counsel, the Missouri Court of Appeals, Springfield District, in its written opinion, declined to review the merits of four of petitioner's claims regarding the prosecuting attorney's improper remarks during his closing argument contending objections thereto had not been properly made and preserved by trial counsel:

> "Appellant seeks to predicate appellate review of the foregoing four portions of the argument by invoking the 'plain error rule.' Rule 27.20(c). However, this court's

review of the four portions does not cause it to deem 'that manifest injustice or miscarriage of justice has resulted therefrom.' Rule 27.20(c) there is no strong, clear showing that injustice will result if the rule is not invoked. State v. Embry, 530 S.W. 2d 401, 404(2) (Mo. App. 1975). The plain error rule cannot be used as a vehicle for review of every alleged trial error which is not asserted or properly preserved in the trial court. State v. Murphy, 521 S.W. 2d 22, 25(2) (Mo. App. 1975). Rule 27.20(c) is of no avail to appellant."

After a motion for rehearing in the Court of Appeals was denied, petitioner filed an application to transfer to the Missouri Supreme Court again alleging that his constitutional rights to due process and equal protection of the law had been denied by the inflammatory and improper argument of the prosecuting attorney.

The motion for transfer was, however, denied by the Missouri Supreme Court.

REASONS FOR GRANTING THE WRIT

I. The Cumulative Effect of the Eight Different Instances of Flagrantly Prejudicial and Improper Argument Which Were Deliberately Made Before the Jury by the Prosecuting Attorney Violated Not Only the Governing Ethical Standards But Also Constitutional Standards Pertaining to Proper Argument Under the Sixth and Fourteenth Amendments Thereby Affecting Substantial Rights of This Petitioner and Requiring Guidelines From This Court Regarding Both the Protection of Defendants' Constitutional Rights to Due Process and a Fair Trial and the Maintenance of Prosecutorial Integrity.

At his trial, petitioner defended the murder charges against him on the grounds of self-defense. Therefore, the credibility of his testimony presumably became the determining factor in the jury deliberations. Assuming petitioner's testimony was credible, the state had no case. However, before the jury could consider petitioner's testimony in a detached manner, the prosecuting attorney, in an attempt to detract from the petitioner's evidence and bolster the state's case, indulged in repeated, deliberate and persistent efforts to inflame and prejudice the minds of the jurors. The prosecutor made flagrantly improper statements throughout his closing argument which effectually undercut the entire case of the petitioner. This Court should therefore review the prosecuting attorney's closing argument, *in toto*, because it violated ethical standards which govern the office of the prosecuting attorney and because it deprived this petitioner of his constitutional rights to due process and a fair trial under the Fourteenth and Sixth Amendments.

In the cited cases which follow, petitioner recognizes a distinction between the standard applied by federal appellate courts in reviewing state court proceedings and the standard which is applicable to the review of federal trial court pro-

ceedings. Although he has cited federal appellate decisions which have reviewed federal trial court proceedings, petitioner submits that such decisions are nevertheless entitled to substantial weight in determining whether similar remarks made by the state prosecutor in the present case violated the federal constitutional rights of this petitioner.

This Court has previously granted certiorari on similar constitutional questions involving far less aggravated circumstances in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). Although on the merits, this Court ruled against that defendant *Donnelly*, petitioner submits that the greater number and more critical nature of the improper remarks made by the prosecuting attorney in the case at bar, make it imperative that this Court reconsider these important issues at this time.

Virtually all American jurisdictions, whether state or federal, recognize that improper remarks made by a prosecuting attorney in his closing argument, similar to those made in the present case, effectively deny a defendant his right to due process and a fair trial under the Fourteenth and Sixth Amendments. See, *United States v. Leon*, 534 F.2d 667 (6th Cir. 1976); *Manning v. Jarnigan*, 501 F.2d 408 (6th Cir. 1974); *Deats v. Rodriquez*, 477 F.2d 1023 (10th Cir. 1973); *United States ex rel. Macon v. Yeager*, 476 F.2d 613 (3rd Cir. 1973), cert. denied 414 U.S. 855; *Edginton v. United States*, 324 F.2d 491 (10th Cir. 1963); *Malley v. State of Connecticut*, 414 F. Supp. 1115 (D. Conn. 1976); *People v. Martin*, 29 Ill. App. 3d 825, 331 N.E. 2d 311 (1975); *People v. Vasquez*, Ill. App. 3d 679, 291 N.E. 2d 5 (1972). See also, *Donnelly v. DeChristoforo*, supra.

A single misstep on the part of the prosecutor may be so destructive of the defendant's right to a fair trial that it requires reversal. See, *Pierce v. United States*, 86 F.2d 949, 952 (6th Cir. 1936). Moreover, where there are repeated instances of improper statements by a prosecuting attorney in his closing

argument, the courts will examine the closing argument *in toto* and determine the cumulative effect of the improper remarks. After enumerating various instances of improper comments by the United States Attorney, this Court, in *Berger v. United States*, 295 U.S. 78, 89 (1934), held:

> "Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be regarded as inconsequential. A new trial must be awarded." Accord, *Locken v. United States*, 383 F.2d 340 (9th Cir. 1967); *United States v. Cumberland*, 200 F. 2d 609 (3rd Cir. 1952); *Pierce v. United States*, 86 F.2d 949 (6th Cir. 1936); and *State v. Heinrich*, supra at 114, 116.

Since single instances of prosecutorial misconduct can deprive a defendant of his constitutional rights, there can be no question but that the combined impact and cumulative effect of all of the instances in the present case had such a result.

In addition to denying this particular petitioner of his constitutional rights, it is submitted that the prosecutor's conduct was also highly unethical in and of itself. While it is true that petitioner was tried in a state court proceeding and consequently this Court's supervisory powers over federal courts are inapplicable, petitioner nevertheless submits that the constitutional questions involved in this case take on an added significance because the governing ethical standards were violated. In addition, a resolution of the constitutional questions by this Court would, effectually resolve the ethical questions pertaining to the nature and extent of prosecutorial argument.

The Code of Professional Responsibility of the American Bar Association speaks to the responsibilities and duties of prosecuting attorneys in Ethical Consideration 7-13 to Canon 7.

Disciplinary Rule 7-106 to Canon 7 relates to proper trial conduct. For instance, it is highly improper for a prosecuting attorney to express his private opinion to the jury of the defendant's guilt if his opinion is based upon matters extraneous to the evidence in Court. It is furthermore improper conduct for an attorney to allude to any matter which he has no reasonable basis to believe will be supported by admissible evidence. See, Missouri Supreme Court Rule 5; Disciplinary Rule 7-106 (c)(1).

In addition to disciplinary rules, the American Bar Association has established standards regarding the "prosecution's function". Standard 5.8 condemns that conduct of which petitioner now complains:

> "(A) The prosecutor may argue all reasonable inferences from the evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
>
> (B) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
>
> (C) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
>
> (D) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict."

The latter mentioned ethical rules are simply a codification of what has always been spoken of generally as the "duties" or "responsibilities" of the prosecuting attorney. This Court summarized the responsibilities of the United States Attorney in *Berger v. United States, supra*:

> "The United States Attorney is the representative, *not* of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal, prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute, with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

See also, *Viereck v. U.S.*, 318 U.S. 236 (1943); *Pierce v. United States*, 86 F.2d 949 (6th Cir. 1936); 63 Am. Jur. 2d Prosecuting Attorneys § 27; *The Professional Responsibility of the Prosecuting Attorney*, 55 Georgia Law Journal 1030; and *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 Texas Law Review 629.

A defendant in a state criminal case should be entitled to no less a standard of due process in connection with the prosecutor's argument than a defendant in a federal case. Due to the potentially great number of those affected and the gravity of the constitutional problems involved, it is essential that the question of improper argument receive guidelines from this Court. In addition, such guidelines are essential to the maintenance of prosecutorial integrity and moreover will serve to inform future litigants exactly where zealous representation ends and where prosecutorial misconduct begins.

II. **The Decision Below, Which Held That the Prejudicial and Inflammatory Arguments Made by the Prosecuting Attorney in His Closing Argument to the Jury Would Not Be Considered Under the Doctrine of "Plain Error", Is Contrary to the Rules and Cases in Both the State and Federal Courts as Well as the Supreme Court of the United States.**

As was noted previously in the Statement of the Case, the Missouri Court of Appeals, Springfield District, did not consider four of the improper statements by the prosecutor in his closing argument nor did it consider the cumulative effect of all four statements combined. The basis for the Missouri Court of Appeals' refusal was that objections were waived and that the doctrine of "plain error" was inapplicable. Petitioner contends that the latter basis for refusing to review is contradictory to case-law decided under similar circumstances, and furthermore contends that the refusal of the appellate courts to review these statements denied him due process and equal protection of the law.

Missouri Supreme Court Rule 27.20(c), V.A.M.R., which was controlling at the time the Missouri Court of Appeals rendered its decision, states that:

> "(C) Plain errors affecting substantial rights may be considered on motion for new trial or on appeal, in the discretion of the Court, though not raised in the trial court or preserved for review, or defectively raised or preserved, when the court deems that manifest injustice or miscarriage of justice has resulted therefrom."

Assuming that under tthe authorities cited in point I above, the petitioner was denied his constitutional rights, it became incumbent upon the Missouri Court of Appeals to consider this petitioner's arguments under the doctrine of "plain error". Missouri case law holds that misconduct similar to that by the

prosecutor in the case at bar is so highly improper that it denies substantial rights of a defendant. A case strikingly similar to the present case is *State v. Heinrich*, 492 S.W. 2d 109 (Mo. App. 1973), wherein the Missouri Court of Appeals, Kansas City District, analyzed the jury argument made by the prosecuting attorney at trial.

In *Heinrich* appellant cited ten quotations[5] from the prosecutor's argument which he contended were improper and further asserted that their cumulative effect denied him of his constitutional rights to a fair and impartial trial and due process of law. However, *Heinrich's* trial counsel had previously objected to only two of these improper arguments at trial and identified specifically only one in his motion for a new trial. Nevertheless, the Court reviewed the issue under the doctrine of "plain error" and held:

> "[9] In the area of jury argument, our courts have laid down specific guidelines as to permissible argument by the prosecutor. He can properly argue to the jury the necessity of law enforcement as a detriment to crime; the evil results that will flow to society from any failure of the jury to do its duty; the responsibility of trial juries in the suppression of crime, and the legitimate inferences to be

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[5] Some of those remarks by the prosecutor which were complained of are: "Someone is going to get hurt, and get hurt bad" . . . "This case is one of the most aggravated cases in criminal law" . . . "Should this man ever be allowed to walk the streets, will he ever be able to walk into society without all of us being afraid" . . . "[I]'m going to ask you to convict this man and give him thirty years in the penitentiary so that he never again will be allowed to walk the streets and to engage in a life of crime" . . . "we don't know whether or not that gun was loaded The only way we could have found out is for Mr. Reno to have been laying in his grave" . . . "We don't want criminals permitted the opportunity to put other innocent folks in their grave" . . . "there is just some folks you can't let out of the cage" . . . "He ought never be allowed to walk in a filling station again. He ought never be allowed to walk anywhere in Clay County again" . . . "He's not going to do it in jail, but wait until he gets out, what will happen the next time?"

drawn from the evidentiary and record facts of a given case. He may not, however, seek by inflammatory appeals to arouse in the jurors personal hostility toward or personal fear of the defendant. He may not 'personalize' the jury. [citations omitted] Neither is it proper argument for a prosecutor to speculate as to the future possible acts or conduct of the defendant. [citations omitted]

* * *

The specific and cumulative effect of this argument and the lack of proper objection to or action by the trial court resulted in an inflammatory and prejudicial atmosphere and foreclosed the possibility of a fair and impartial trial. We take cognizance of this as plain error involving substantial constitutional rights under Rule 27.20(c)."

Accord, *State v. Davis*, No. 36,768 (Mo. App. June 15, 1976); *State v. Nolan*, 499 S.W. 2d 240 (Mo. App. 1973); and *State v. Lewis*, 443 S.W. 2d 186 (Mo. 1969).

In addition to its failure to afford petitioner the benefit of previous Missouri case law, the Missouri Court of Appeals' decision to not apply the doctrine of "plain error" to the closing argument is also contrary to the case law in other states. See, e.g. *People v. Martin*, supra; *People v. Vasquez*, supra; *State v. Hawley*, 229 N.C. 167, 48 S.E. 2d 35 (1948); *Jenkins v. State*, 49 Texas Crim. 457, 93 S.W. 726 (1966); *State v. O'Donnell*, 191 Wash. 511, 71 P. 2d 571 (1937).

Federal case law also supports the proposition that the claimed prosecutorial misconduct in the case at bar should be considered under the doctrine of "plain error" since it affects "substantial rights" of the accused. See, e.g., *Deats v. Rodriguez*, 477 F. 2d 1023 (10th Cir. 1973); *Locken v. United States*, 383 F. 2d 340 (9th Cir. 1967); *Edginton v. United States*, 324 F. 2d 491 (10th Cir. 1963); *United States v. Cumberland*, 200 F. 2d 609 (3rd Cir. 1952); and *Malley v. State of Connecticut*, 414 F. Supp. 1115 (D. Conn. 1976).

This Court, likewise, recognizes the doctrine of "plain error."[6] In *United States v. Atkinson*, 297 U.S. 157, 160 (1935), a leading case on "plain error", this Court held:

> "Appellate Courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."

Accord, *United States v. Socony-Vacuum* Oil Co., 310 U.S. 150 (1939).

The *Atkinson* "plain error" rule was also applied in *Screws v. United States*, 325 U.S. 91, 107 (1945), wherein this Court held:

> "It's true that no exception was taken to the trial court's charge. Normally we would under those circumstances not take note of the error. See *Johnson v. United States*, 318 U.S. 189, 200. But there are exceptions to that rule. *United States v. Atkinson*, 297 U.S. 157, 160; *Clyatt v. United States*, 197 U.S. 207, 221-222. And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offense are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed."

See also, *Brassfield v. United States*, 272 U.S. 448, 450 (1926); *Weems v. United States*, 217 U.S. 349, 362

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[6] Supreme Court Rule 40(d)(2) states that even if an issue is not represented to the Court in "Questions Presented", it might still be considered under the doctrine of "plain error".

(1910); *Wiberg v. United States*, 163 U.S. 632 658 (1896).

Specifically, where a prosecutor has engaged in improper remarks during his closing argument, this Court has also applied the doctrine of "plain error". In *Viereck v. United States*, 318 U.S. 247-248 (1942), this Court condemned the rhetoric used by the prosecutor while prosecuting an espionage-related charge during World War II:

> "As the case must be remanded to the district court for further proceedings, we direct attention to conduct of the prosecuting attorney which we think prejudiced petitioner's right to a fair trial, and which independently of the error for which we reserve might well have placed the judgment of conviction in jeopardy. In his closing remarks to the jury he indulged in an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice. The trial judge overrules, as coming too late, petitioner's objection first made in the course of the court's charge to the jury.
>
> At a time when passion and prejudice are heightened by emotions stirred by our participation in a great war, we do not doubt that these remarks addressed to the jury were highly prejudicial, and that they were offensive to the dignity and good order with which all proceedings in court should be conducted."

Accord, *Lawn v. United States*, 355 U.S. 339, 359-360, n. 15 (1958).

In view of the numerous decisions conflicting with that issued by the Missouri Court of Appeals, wherein the doctrine of "plain error" is so frequently invoked by those courts in similar circumstances, it is submitted that standards for the doctrine's

application should be set by this Court for such situations, namely, where constitutional rights are clearly violated by improper prosecutorial argument.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Missouri Court of Appeals, Springfield District.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the Missouri Court of Appeals
Springfield District

State of Missouri,
Plaintiff-Respondent,
vs.
Junior Ernest Gibson,
Defendant-Appellant.

No. 9965 and
No. 9966

Appeal From the Circuit Court of Phelps County, Missouri

Honorable James T. Riley, Judge

Norman S. London, Lawrence J. Fleming,
London & Greenberg, of St. Louis for Defendant-Appellant;

John C. Danforth, Attorney General, Charles L. Howard,
Assistant Attorney General of Jefferson City
for Plaintiff-Respondent.

Before Hogan, P. J., and Flanigan, J., and Campbell and Pyle, Sp. JJ.

Affirmed

Flanigan, J. Appellant Junior Ernest Gibson was charged with murder in the second degree (§ 559.020 V.A.M.S.) of Buster Harrison Farrell and with murder in the second degree of Bobbie Gene Hopkins. Both slayings took place on May 18, 1970. By stipulation of the parties the two cases were tried together before a jury. The jury found appellant

guilty of the second degree murder of Hopkins. On the charge pertaining to the victim Farrell, the jury found appellant guilty of manslaughter. The defendant was sentenced to 10 years on each conviction, the sentences to run consecutively. Appellant does not question the sufficiency of the evidence to support the two convictions.

Appellant presents three assignments of error, each dealing with alleged misconduct on the part of the prosecuting attorney.

Appellant's first contention is that the closing argument of the prosecutor was improper in six particulars and that he should have received a new trial by reason thereof.

Of the six portions of the prosecutor's argument singled out for complaint in this court, three[1] were not objected to at the time of trial nor was complaint concerning them made in the motion for new trial. Thus "no proper foundation has been laid for presentation of the matter on this appeal," State v. Jackson, 511 S.W.2d 771, 775[3] (Mo. 1974) and they need not be considered.

The fourth portion[2] of the prosecutor's argument, of which complaint is made here, was not mentioned in the motion for new trial although an objection, somewhat indefinite and belated, was made at the trial itself. This assignment has not been preserved for appellate review because it was not included in the motion for new trial. State v. Raspberry, 452 S.W.2d

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[1] (a) "The prosecutor improperly argued that if the victims were alive, they would testify differently than defendant."

(b) "The prosecutor improperly argued that if the jury acquitted the defendant they would be condoning his actions and subjecting the public to great dangers."

(c) "The prosecutor improperly argued matters of character which were irrelevant and which were not supported by the evidence."

[2] "The prosecutor improperly argued his personal opinion regarding the guilt of defendant."

169, 172[1] (Mo. 1970); State v. Jackson, 511 S.W.2d 771, 775[7] (Mo. 1974); State v. Brown, 528 S.W.2d 503, 505[4, 5] (Mo.App. 1975). Moreover, the record does not fully substantiate appellant's description of the fourth portion.

Appellant seeks to predicate appellate review of the foregoing four portions of the argument by invoking the "plain error rule," Rule 27.20(c). However, this court's review of the four portions does not cause it to deem "that manifest injustice or miscarriage of justice has resulted therefrom." Rule 27.20(c). There is no "strong, clear showing" that injustice will result if the rule is not invoked. State v. Embry, 530 S.W. 2d 401, 404[2] (Mo.App. 1975). The plain error rule "cannot be used as a vehicle for review of every alleged trial error which is not asserted or properly preserved in the trial court." State v. Murphy, 521 S.W.2d 22, 25[2] (Mo.App. 1975). Rule 27.20(c) is of no avail to appellant.

As his fifth challenge to the prosecutor's argument, appellant claims that the prosecutor "improperly argued matters concerning the alleged violent nature of defendant."

At the trial appellant testified in his own defense. On cross-examination the prosecutor elicited that appellant had been convicted of assaulting his wife. That charge arose out of the occurrence of May 18, 1970, from which stemmed the present charges. The appellant also admitted that he was convicted in Illinois of assaulting a woman.

During prosecutor Zane White's argument the following occurred:

Mr. White: "He had killing on his mind. His personality and his tendency to viciousness has been established twice in court, once over in Illinois where he was convicted and received a 6 months sentence for an assault upon a woman."

Mr. Wiseman [defense counsel]: "Just a moment. I object to that, Your Honor. Your Honor instructed the jury a moment ago that the conviction over in Illinois could not be used for any purpose in this case."[3]

The Court: "That's correct. That conviction was shown only for the purpose of his credibility, Mr. White. Stay within the record and the court's instructions."

Mr. White: "Do you believe that a man—do you believe his story of this thing is believable? This man of this degree of violence, this tendency?

"He has not only killed two people but been convicted of shooting his wife and assault upon a woman way over in Illinois, not in any way related, connected with this incident here——"

Mr. Wiseman: "I object to that, Your Honor."

Mr. White: "I'm arguing with respect to the believability of his story itself."

The Court: "All right; if that's the purpose of showing it, overruled."

In support of his position, appellant relies upon the following language in State v. Mobley, 369 S.W.2d 576, 580[2, 3] (Mo. 1963): . . . "[T]he only legitimate purpose of an argument concerning prior convictions lies in its bearing upon the credibility of the defendant . . . It is improper to argue prior unconnected crimes as reflecting upon the defendant's character or as a basis for a conviction in the case on trial."

However, *Mobley* is distinguishable. There the prosecutor made five separate references to the criminal record of the defendant and the only ruling of the trial court helpful to the de-

[3] Among the instructions given the jury was MAI-CR 3.58 which deals with limiting the effect of a prior conviction to the issue of credibility.

fendant was one which struck a portion of one of the five references and instructed the jury to disregard it.

Here the original objection of defense counsel was only a general one—"I object to that." No ground[4] for the objection was stated. But defense counsel said that the Illinois conviction "could not be used for any purpose in this case." The trial court stated that counsel's remark was "correct" and added that the Illinois conviction was shown "only for the purpose of his credibility." Because the defendant had testified, the Illinois conviction could properly be shown as affecting his credibility. § 491.050 V.A.M.S.; State v. Phelps, 478 S.W.2d 304, 307 (Mo. 1972). The second objection of defense counsel also stated no ground for the objection and apparently was directed to the Illinois conviction. The prosecutor stated that he was "arguing with respect to the believability of his story itself." The court, after stating "if that's the purpose of showing it," overruled the general objection. No further relief was requested by appellant.

This court concludes that the portion of the argument here under consideration "taken in [its] full context, should be construed as going merely to the question of credibility." State v. Slay, 406 S.W.2d 575, 580 (Mo. 1966). This is not a situation where there was "almost complete lack of action by the trial court" which, according to State v. Renfro, 408 S.W.2d 57, 60 (Mo. 1966), was the situation in *Mobley*.

The facts here are more akin to those in State v. Patrick, 420 S.W.2d 258, 262[1] (Mo. 1967) and State v. Phelps, 478 S.W.2d 304, 307 (Mo. 1972), in each of which a prosecutor's argument, alluding to the criminal record of the defendant without expressly limiting its effect to the defendant's credibility as a witness, was held, under the particular circumstances, not to

[4] An objection to arguments or statements of counsel must be specific and the objection must call the attention of the court to the ground or reason for the objection." State v. Farmer, 536 S.W.2d 748, 751 [10] (Mo.App. 1976).

require the granting of a new trial. See also State v. Raspberry, 452 S.W.2d 169, 173 [7-11] (Mo. 1970).

Appellant's fifth challenge to the prosecutor's argument has no merit.

Appellant states his sixth attack upon the prosecutor's argument as follows: "The prosecutor improperly implied the guilt of defendant because he had retained a particular counsel from Illinois."

This attack is based on the following occurrence during the closing argument of prosecutor Zane White:

Mr. Zane White: "Now of course this defense attorney, Mr. Wiseman, wise man, I guess his name means in some language or the other. He is no doubt wise and no doubt extremely successful. They have gone through this thing once before, as the evidence indicates and lost, and the man is now in the Penitentiary——"

Mr. Jay White: "I object, Mr. Wiseman wasn't in that case."

Mr. Zane White: "I know that. But let me finish my statement before you jump up and interrupt so rudely."

The Court: "Well, stay within the record here."

Mr. Zane White: "They no doubt searched in an ever-widening circle for a man who was capable and bright enough to clear this man and they eliminated the whole State of Missouri and had to get over in Illinois to get one they felt could do the job."

Mr. Wiseman: "Now, just a moment, I want to make my objection, his selection of counsel is not involved in this case."

The Court: Sustained."

During voir dire examination Mr. Wiseman, one of appellant's attorneys, introduced himself to the panel as "a lawyer from Alton, Illinois." Twice during Wiseman's closing argument, which preceded the attacked portion of the prosecutor's argument, he mentioned the fact that he was from Alton, Illinois. His first statement was: "I am from Alton, Illinois. Do you know where it is? Across the river from St. Louis, 13 miles." His second statement was: "I came from Alton, Illinois, it is still in the United States, I think. You do not have to go through a customs board when you cross the Lewis-Clark Bridge. I came over to Missouri. It says 'Welcome to Missouri.' "

Of course the fact that Mr. Wiseman came from Alton, Illinois had nothing to do with the guilt or innocence of appellant and neither the prosecutor nor Mr. Wiseman is to be commended for emphasizing that extraneous fact.

The first objection made by Mr. Jay White was general in nature and the segment of the argument to which it was addressed made no mention of Mr. Wiseman's being from Illinois. The second objection, made by Mr. Wiseman, was sustained. No further relief was requested by appellant.

". . . Questions of the propriety of oral argument are addressed to the discretion of the court; and a reversal on such ground occurs only upon abuse of such discretion." State v. Jewell, 473 S.W.2d 734, 741[8] (Mo. 1971). State v. Farmer, 536 S.W.2d 748, 751[7] (Mo.App. 1976). This court finds no such abuse. Appellant's sixth attack upon the prosecutor's argument has no merit.

Appellant's second contention is that the trial court erred in not declaring a mistrial and in not granting a new trial on "grounds that the prosecutor repeatedly, through his questions, interjected immaterial matters which were highly prejudicial, inflammatory, and which were not supported by the evidence."

Appellant's brief, in setting forth the factual predicate for this assignment of error, gives only two citations to specific pages in the transcript. See Rule 84.04(h). Those pages are 311 and 396 (the transcript, which this court has read, is 531 pages

long). Page 311 contains a portion of the prosecutor's cross-examination of appellant's mother. Page 396 contains portions of the prosecutor's cross-examination of appellant. On neither of the two pages did appellant's counsel make any objection to the cross-examination now attacked.[5] Moreover, the topics of the cross-examination were matters which had been developed on direct examination of the two witnesses by appellant's counsel.[6] Appellant's second contention has no merit.

Appellant's third contention has two prongs. The first is that the trial court erred "in allowing the prosecutor to imply during cross-examination that defense witnesses had gone through a mock trial."

During the course of the testimony of defense witnesses Fannie Gibson (appellant's mother) and Orville Gibson (appellant's son), it was developed that on the night before the trial these two witnesses, several other members of appellant's family, and appellant's three lawyers met together at a local motel. Fannie testified that at that session "each one of us read the transcript." The record does not disclose what transcript the witness was referring to but it seems a reasonable inference that it was the transcript of the testimony at the trial of appellant for assaulting his wife, or the transcript of a prior proceeding in the cases at bar.

Orville Gibson testified that in the motel session "we just went over what was previously said and stuff like that. . . . The lawyers read the testimony of various troopers and different ones." Orville added that this was done "to get me to think about what I remembered."

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[5] See State v. Taylor, 486 S.W.2d 239 (Mo. 1972).

[6] "The defendant did not adhere to the general rules to develop his evidence in chief and consequently, having brought the matter out on direct examination, may not now complain of the cross-examination of his witnesses with reference to the same or related subjects." State v. Carroll, 188 S.W.2d 22, 24 [5] (Mo. 1945).

The conduct of the prosecutor, assailed by appellant, consisted of asking Mrs. Gibson whether, at the motel, she "went through a practice session of testifying," and whether she "did not have a mock court set up." The witness answered in the negative to both questions.

There is no claim that the prosecutor acted in bad faith in making the inquiries concerning the practice session and the mock trial. The extent of cross-examination on collateral matters for the purpose of impeaching a witness is largely within the trial court's discretion, State v. Parton, 487 S.W.2d 523, 526[7] (Mo. 1972), and the record does not show an abuse of that discretion.

Moreover, a substantial array[7] of authorities supports the proposition that the prosecutor's inquiries were within the proper scope of cross-examination.

The second prong of the third contention is that the trial court committed error in refusing to give an instruction, offered by appellant, purporting to deal with the right of appellant's counsel to interview witnesses. The second prong need not be

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[7] "During cross-examination of some of defendant's witnesses, counsel for plaintiff questioned them concerning a meeting held at a hotel in Carrollton, the night before, which was attended by defendant and by certain of his witnesses, invited by him, and by two of his attorneys. Some of the witnesses stated that, at that meeting, they discussed with counsel what their testimony would be. During colloquy between opposing counsel the Court admonished counsel for plaintiff not to make remarks which might reflect on defense counsel. It is not, and could not successfully be contended, that plaintiff could not properly inquire concerning the meeting, its purpose, the subjects there discussed, and the interest of witnesses in defendant's cause." Vitt v. Baer, 335 S.W.2d 681, 682 (Mo.App. 1960).

See also State v. Carson, 239 S.W.2d 532, 538 [15] (Mo.App. 1951); Solar v. United States, 94 A.2d 34 (D.C. 1953); State v. Hayward, 62 Minn. 474, 65 N.W. 63 (1895); People v. Becker, 210 N.Y. 274, 104 N.E. 396 (1914); Boulden v. State, 102 Ala. 78, 15 So. 341 (1894); Anno. 35 A.L.R.2d 1045 (Cross-examination of

considered for the reason that appellant's brief fails to comply with Rule 84.04(e); State v. Fleming, 528 S.W.2d 513, 515[2] (Mo.App. 1975). That rule provides, in part, "If a point relates to the . . . refusal . . . of an instruction, such instruction shall be set forth in full in the argument portion of the brief." The argument portion of appellant's brief does not set forth the refused instruction.

Appellant's third contention has no merit.

There is no error in the matters of record reviewed pursuant to Rule 28.02 V.A.M.R.

The judgment in each case is affirmed.

/s/ GEORGE M. FLANIGAN
Judge

All concur.

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witness in criminal case as to whether, and with whom, he has discussed facts of case.)

In *Boulden*, p. 343, the following language appears: "It is common, and we think allowable, practice to inquire of witnesses, on cross-examination, if they have talked with others in reference to the facts of the case; not as a means of impeaching the character of the witness, but of testing the accuracy of reliability of his recollection. If a witness' memory has been refreshed before going on the stand by having the facts rehearsed to him by others, we think the jury ought to know it, that they may consider it for what it appears to be worth in determining how far the recollection of the witness is reliable. Hence, if the wife of the deceased, who was in the courthouse, rehearsed to the witness Banks, before he went upon the stand, the alleged dying declarations of her husband, the defendant should have been permitted to prove the facts on cross-examination of Banks, as he proposed to do."

APPENDIX B

To Petition for Writ of Certiorari

(Emphasis supplied throughout)

(Argument of Prosecuting Attorney)

[464] MR. ZANE WHITE: Mrs. Hawthorne, and Gentlemen of the Jury. I will now make the closing argument as to the way I view the evidence which has come from the witness stand.

Now these exhibits have been admitted into evidence.

To start out with, we have here for you to decide, two criminal cases, which under the law is a crime against a person. That's the type of case it is.

And of course there is a moral parallel in the 10 Commandments, "Thou Shalt Not Kill."

Now, of course, he is not being tried for a violation of the Ten Commandments, he is being tried for a violation of the Missouri Statute, which defines murder such as has been read to you.

Now under the Missouri law, of course, there is an exception to that rule, "Thou Shalt Not Kill." And that that is self-defense. That's the exception that the defendant is relying upon in this case.

From listening to his testimony, why he is trying to impress the Jury, whether you believe him or not, that he killed these two men to defend his own life. That's what he testified to.

Now is there any evidence—let's take up first Bobbie Gene Hopkins. Is there any evidence to the contrary **[465]** but what the defendant shot and killed Bobbie Gene Hopkins? None;

absolutely none. The defendant got on the witness stand and admitted to it, that he shot him and killed him.

The same is true with respect to Buster Harrison Farrell. Nothing to the contrary—all of the circumstantial evidence and the defendant's own testimony indicates that the defendant shot and killed Buster Harrison Farrell, so there is no doubt but what he killed both of them, in both criminal cases, so I don't see how the jury could arrive at any other conclusion other than he killed him, but you have to consider the defendant's defense of self-defense.

Now, let's take a look at Bobbie Gene Hopkins and see whether or not that was justified.

To begin with, taking the defendant's own testimony, if he told the truth in that one respect, he said he did not know Hopkins, didn't know who he was, and that Hopkins came up to him, he said rushed him, I think is what he said, and said, "Who are you?"

And that that's all Bobbie Gene did. He didn't touch him, he didn't draw back his fist, he didn't threaten him, he was unarmed—all he did was come up to this man, and whatever his gait was, however fast or slow his approach, and say, "Who are you?" And he was shot right between the eyes, straight-on, straight into the head, and killed. One shot dropped him dead.

[466] *If you turn this man loose, in your ruling you are going to rule that any time anybody comes up to another person, an unarmed man or woman or whatever they are, comes up to another person, who is armed with a revolver, and says, "Who are you?" without laying a finger on them, without raising a weapon or anything, then you can shoot them down dead and then they are paid for. That's what this defendant did to Bobbie Gene Hopkins.*

And that is by his own testimony, which I am going to go into a little bit later. You have just heard one side of the flapjack.

Now, if Bobbie Gene Hopkins was here to testify, I am sure he would testify different than the defendant.

I never have yet tried a lawsuit in which the victim didn't tell a different story than the defendant did.

They always, each one has a different version of the crime.

In this case, Bobbie Gene Hopkins can't speak from the grave. His voice is forever stilled; his story will never be heard; all you have to do, all you have got before you is the story of the killer, and the circumstantial evidence.

Bobbie Gene Hopkins was unarmed. He never touched the defendant. And yet he was put in his grave by this man.

[467] *Is that the kind of behavior you want to put your stamp of approval on as jurors?*

The only protection the public has is your decision here today. That's as far as I can go—I can file the charges, but I can not convict. I can't give the county more law enforcement than 12 jurors is willing for them to have. That's our Democracy.

Now, let's take Buster Harrison Farrell. Here was an unarmed man, Buster Harrison Farrell. Of course they had had trouble, according to the defendant, and all of his family came in here to the rescue of this man, this defendant, and began to testify in his behalf, and no doubt they have told his side of the story, which I don't blame them.

I don't know to what extent I would go if I was accused of murder and facing life imprisonment. I don't really hold it against anybody for trying to get out of it, of a rap like this.

But you take that into consideration in your deliberations. This man has told a story here today, or here in these three days, two days of trial, that he calculates will clear him.

He is standing trial; he has put his case up to you people, and he wants you to turn him loose, and he expects the story he told

and the testimony he presented to clear **[468]** him. There is no doubt about that.

He has gone over to Illinois and hired a lawyer that he thought could clear him, and he has got plenty of money behind him. The testimony is he's pretty well fixed. He has got a big farm, and he has got money, and he owns two automobiles.

Now, of course if his story is true, which is what you have got, plus circumstantial evidence, just take his story, that Buster Farrell came rushing up like he was going to tackle him, which got him over to explain the angle of the bullet, because he shot him in the temple and the bullet was lodged down here. There was no opening around the neck where the bullet come out and went in there, so it had to have come in the temple, down through his neck and come down into his arm, so he would have had to have had his arm out at an angle something like this (indicating), straight out at an angle like that, at the time he was shot in the left temple.

Now this defendant testified that he rushed him bent over like that and then he got up, then he straightened up and struck him, he said, with his fist, and knocked him against the car door, and then he was shot.

You see in his haste to explain the angle of the bullet, he got the man over, but just like all stories that's made up, there is a hole in it.

[469] It's awful hard to make up a lie that will stick. Now, the truth will stick very easy, but here was Buster Harrison Farrell, according to the defendant's own story, he overlooked that element—the man raised up and hit him, then he said he reached in the car, after he was struck, that's his story, he reached in the car where he had this gun laying just inside the open window, he reached it out, and he said he don't know which one he shot first.

But you stop and think about that. That does not explain the angle of the bullet, and I say to you with this man and his height, and the way he would have to hold a gun, to shoot a man taller than him, and in his testimony he said Buster Farrell was taller than him, how in the world could a shorter man shoot a taller man in the left temple and it come out in this arm unless the taller man was down?

He had to be down, either bent over, either checking on Hopkins, to try to give assistance to Hopkins, or else he had been knocked down by the car, or something else.

We don't know what happened for sure. We have got this defendant's testimony.

Farrell's voice can't be heard from the grave either. He can't tell what happened. He can't tell his version of it. He can't be here and deny "I made these phone calls" and "I made these threats to all of these relatives," and "I did this and I did that" —he can't be here to deny that. All that he can **[470]** *do is rely upon you Ladies and Gentlemen of the Jury to compare this one-sided story of the defendant against the circumstantial evidence, and to reach a fair and just verdict.*

Now, of course there are a lot of other holes in the defendant's story, which I will go into a little later, but you are to decide, you are the ones to weigh the evidence and decide whether you believe the defendant's story in every respect or not.

Now, then, let's go back to the beginning of this thing.

Here was the situation, you see, where the defendant's wife, Minnie, and he were getting a divorce, and he testified he wasn't interested in trying to save his home any longer, he didn't want Minnie no more. What he wanted was the children.

Of course there is a lot of money involved there out the defendant stated he didn't, he never made any statements concerning that, but you can bet your bottom dollar that that was

in the back of all of their minds, Old Pop Gibson, and Junior, his son and all of them, they didn't want Minnie to get any part of their farm and no part of their money. They was going to cut her off cold.

She was good enough for them, sure, to raise them six children, six fine children, and I believe they are **[471]** *fine children—this one boy is a teacher—and I don't believe that that son was raised by any prostitute or any alcoholic, which they would like you to believe Minnie Gibson is today.*

They kind of convinced me, from listening to this evidence, that she has made a lot of mistakes, but Minnie Gibson is not on trial here today, and because a man and his wife are not getting along, after her raising six fine children for this man and they are not getting along, why suddenly, because she is drinking beer, why she is an alcoholic, and after this man is through with her and she takes up with another man, she is suddenly a whore, and not fit to have any of his money and not fit to have any of the children.

That's their story, and that's probably the way they honestly feel about it.

But that is not what is before you. Now, birds of a feather flock together, is the way I look at it.

I didn't date Minnie Gibson, I didn't fall in love with her, and I didn't marry her, and I didn't know her before all of this trouble started.

The defendant did. He did all of that. Now, if she was so much beneath him and if she is so bad of a person as they want you to think, and they want to let you think she is to blame for the killings and that justifies him shooting **[472]** these two men —that's how they are trying to confuse the issues, but I tell you, birds of a feather flock together, and he and Minnie are probably about two of a stripe.

And maybe Buster Harrison Farrell and Bobbie Gene Hopkins was about the same caliber of people too.

But that don't justify—suppose they are the same caliber, that don't justify him shooting his wife, and by the way, he was convicted of that.

And that don't justify him shooting Bobbie Gene Hopkins and Buster Harrison Farrell either, just because he and Minnie were having trouble.

Now, he followed them out there with all of this on his mind, this background, this man he did not know, and his estranged wife, who he did not want back, and Buster Farrell, who he says was his wife's boy friend, and I don't know whether that's true or not, but even if it were, let's just say that was true, but he wasn't following them to try to save his home, and once they left St. James and he knew they weren't going to any tavern any more, then what was he still following them for?

Of course he says he passed them and then they passed him. But he started out following them. He was armed; they were unarmed, you see.

He had this 9 millimeter Browning automatic, it was an automatic made with the Browning patent, and it was loaded, **[473]** and ready to shoot and ready to kill somebody, and he was following them.

He knew they weren't going to any tavern after they went up that road. What was his purpose in following them at that point? Think about it!

He knew then that they were going home, to the Fangers, to Minnie's folks, to spend the night.

Why would he continue to follow them?

Could it be that he had in the back of his mind, I would wish that some situation would arise where I could kill these people?

He had killing on his mind. His personality and his tendency to viciousness has been established twice in court, once over in Illinois where he was convicted and received a 6 months sentence for an assault upon a woman.

MR. WISEMAN: Just a moment. I object to that, Your Honor. Your Honor instructed the Jury just a moment ago that the conviction over in Illinois could not be used for any purpose in this case.

THE COURT: That's correct. That conviction was shown only for the purpose of his credibility, Mr. White. Stay within the record and the Court's instructions.

Do you believe that a man—do you believe his story of **[474]** *this thing is believable? This man of this degree of violence, this tendency?*

He has not only killed two people but been convicted of shooting his wife and assault upon a woman way over in Illinois, not in any way related, connected with this incident here——

MR. WISEMAN: I object to that, Your Honor.

MR. ZANE WHITE: I'm arguing with respect to the believability of his story itself.

THE COURT: All right; if that's the purpose of showing it, overruled.

Now he's coming in here, this man, this kind of a man and he was following them, which you know he couldn't have been following them to take any more pictures of her drinking beer in a tavern because they wasn't going to any tavern—he wants to come in here and say: "Yeah, I started following them all right; we got out there and they waylaid me and I had to kill them in self-defense."

We don't know how it happened that both cars would be stopped out there, just what the defendant says. There could have been any kind of a situation.

Now, you have got a situation where this defendant had human blood, hairs, etc. on the bottom of his vehicle, so the Patrolman says, and blood spots on his tires, and you have **[475]** got tire tracks across the body of Buster Harrison Farrell, and you have got the angle of the bullet into the temple and over in his arm; you've got the origin and the destination of that bullet.

It could be that Buster Harrison Farrell was run over first and then he was shot while he was helpless on the ground. It could be!

If the defendant is going to make up that kind of a story which would clear him—he wouldn't hesitate to make that up and tell it to you if he was so inclined.

The evidence, the circumstantial evidence certainly does not back up his story. He said he never did run over Farrell, yet he had all of this blood and stuff underneath his car.

His explanation, when I asked him to explain that, if you remember, was that he probably, as he came back, run through the puddle of blood and some of it splashed, this hair and blood and stuff splashed up.

But how could the hair get off of this man's head and over into the puddle of blood unless somebody struck his head as it went over him or something?

He was shot in the temple here and then he fell to the ground. How could any human hair get over in that puddle of blood and then splash up on this man's car?

It's obvious to me, and I take the position that the **[476]** *defendant lied on the witness stand.*

Now whether you follow my thinking on that, I don't know, but there is other, a lot of other evidence—not just his story —this defendant's story doesn't match the circumstantial evidence.

And he told the Troopers, if you believe these two Highway Troopers, then the defendant lied about what he told them in several instances; he lied about what they did in several instances, maybe not so material except for the fact that it points out that somebody on that witness stand was lying.

It was either these two Highway Troopers or the defendant and his family, his mother and other people who are intensely interested in seeing this man come clear.

Now, some of these things, I think I went into 5 points in conflict in testimony on rebuttal.

One of them was the defendant testified that he went to the Highway Patrol, he came to my office and he went to the Sheriff's office trying to get help and we all turned him down, and that then he decided the only protection the poor guy could go get was to get a gun and protect himself.

And he testified that Trooper Myers was out there before he purchased this gun and that that was the last resort. That was his story.

[477] The trouble was that counsel for the defense failed to look at the report or obtain from Trooper Myers the date on which Trooper Myers had been out there, and the gun permit, which they put in evidence themselves, showed that the defendant purchased the gun on November 17, 1969.

He had State's Exhibit 1 already—he was already planning to use this in some manner, whether in self-defense, self-protection or an illegal killing, we will never know from his lips because he won't tell us.

But he had bought that gun and had it in his possession prior to the time he was telling us he was being threatened and all of that stuff, so could it be that this man at that time had it in the back of his mind, this man of violence had it in the back of his mind he was going to set these people up for pigeons; they were threatening his life and, therefore, after

he had killed them, he would claim self-defense and nothing could be done and he would walk away clear from the murder.

Could that be why he went around to all of these officers?

He already had this gun. Trooper Myers went out there on December 2, 1969 which was approximately 3 weeks; he had that gun approximately 3 weeks by the time he made the rounds of the officers, to tell them all of this, that he had been threatened by Farrell and Minnie.

[478] Could it be that he intended to kill them right then, already was trying to kill them, and was trying to set up an alibi?

I am suspicious that that's probably what he had in his mind. Of course I don't know for sure. But it does look suspicious.

Now, then, he went ahead and changed his story from what the Troopers said he told them, in several respects. In other words, he told them one story at the time of the incident, and he got on the witness stand and testified differently to about three or four points.

Now, could it be that after he had got ahold of lawyers and had talked to them about constitutional rights and all of this, that and the other thing, that he decided that he had better change his story and give himself a better shot at coming out clear?

And I kind of believe that to be the case. It just looks to me very much like it.

These two Highway Troopers, unless they are lying, when they walked in the door the defendant said, "There's the gun I shot them with."

They both swore to that. They had that in their report, and said they did, and said that's what happened.

And he said, "I shot them out on Highway U Overpass," or something such as that, and then he was arrested, and then **[479]** he was read his rights.

Now, then, his story was that he was never arrested at the home of his parents. I asked him specifically and he said he was never arrested at the home of his parents. And he was never read his rights.

Now, if the defendant told the truth from the witness stand both of these Highway Troopers are liars, and if the Highway Troopers told the truth, then the defendant was telling lies from the witness stand and his alibi or defense, his self-defense in this thing is a cock and bull story, and a lie.

Now, I am going to ask you, Lady and Gentlemen of the Jury, to give this man a sentence of life imprisonment for the shooting and killing of Bobbie Gene Hopkins, and I am going to ask you to do the same in the death of Buster Harrison Farrell.

I don't think—I can't see it any other way. A man of this degree of viciousness. He has already killed two persons; he has already been convicted of two acts of violence, the shooting of another person, his wife, shot her twice, once through the mouth and once in the chest and luckily, she is alive. And then this assault upon another woman way off in another state somewhere. A man of that caliber should be put away to where he could not again commit a crime against innocent people in a free society.

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[500] * * * county but I want to tell you, to a lawyer, the greatest opportunity to serve is either as a Prosecutor or a defense lawyer, so if we get over-anxious, why it's just kind of a natural thing. This is our job.

Thank you very much.

MR. ZANE WHITE: May it please the Court—Mrs. Hawthorne and Gentlemen of the Jury. Counsel for the defense

from Illinois has been thanking you for listening and that sort of thing.

I feel that we are all here for one purpose and we don't owe one another any thanks except we need to do our duty.

I think you ought to appreciate me as much as I will appreciate you and thanks ought to be coming my way as much as it's going your way. In other words, we're on equal footing. I am not going to get down and start bragging to get a verdict on that ground.

In fact, you swore to bring in a true verdict according to the law and the facts, so Help you God. That's what you swore to do.

I swore to uphold the laws of Missouri and the Constitution of Missouri. And if I do that, you owe me just as much thanks as I owe you.

Now, I have gone just as far as I can go in this case.

[501] *And you know my viewpoint by now, no doubt, that I think this man is guilty. If I thought he was innocent, I would have stood firm and refused to prosecute him, but from my viewing of the evidence as it was brought to me by the investigating officers in whom I have——*

MR. JAY WHITE: Just a minute. Your Honor, I object to this line of argument, putting in his own personal reputation.

THE COURT: Yes, Mr. White.

MR. ZANE WHITE: The defense, Your Honor, opened up this thing by thanking the Jury and putting himself in that position.

THE COURT: Yes, I know, but you have to base your conclusions, as stated to the Jury, on the evidence as presented in the Court: I believe that's the objection.

MR. JAY WHITE: Yes, sir.

MR. ZANE WHITE: *Now of course this defense attorney, Mr. Wiseman, wise man, I guess his name means in some language or the other. He is no doubt wise and no doubt extremely successful. They have gone through this thing once before, as the evidence indicates and lost, and the man is now in the Penitentiary——*

MR. JAY WHITE: *I object, Mr. Wiseman wasn't in that case.*

MR. ZANE WHITE: *I know that. But let me finish my statement before you jump up and interrupt so rudely.*

THE COURT: *Well, stay within the record here.*

MR. ZANE WHITE: *They no doubt searched in an ever-widening circle for a man who was capable and bright enough to clear this man and they eliminated the whole State of Missouri and had to get over in Illinois to get one they felt could do the job.*

MR. WISEMAN: *Now, just a moment, I want to make my objection, his selection of counsel is not involved in this case.*

THE COURT: Sustained.

MR. ZANE WHITE: *Now, of course, this clever man from Illinois, this great defense counsel who came here with the avowed purpose of clearing this man, and that's all right, there is nothing wrong with him coming here and defending this man to the best of his ability. That's our adversary system.*

But he has tried to put Minnie's character in issue.

He wants you to turn this man, this defendant loose because they say Minnie is no good now, after raising 6 children for this man, and they brag on these children to beat the devil, which I think is probably justified, except they have got this one poor child who was, I think 8 or 9, they **[503]** have got him back under their control, they brought him in here—he's the

only one who testified about any shiny gun carried at all times by Farrell.

Just a child! Totally dependent on this defendant, the accused, and the child is under his supervision and control, and for the first time in any of these proceedings, the defendant takes the witness stand.

He didn't testify in the preliminary hearing of this case; he didn't testify——

MR. JAY WHITE: *I object to that. He knows that's not the case. He knows that he did testify.*

THE COURT: *I don't know whether he did or not, but it's not in the record here. Stay within the record here today.*

MR. ZANE WHITE: *I will read the record, Your Honor, that I am referring to. The defense counsel has already read the record.*

THE COURT: *Well, we don't read the record in argument. The evidence is all in.*

MR. ZANE WHITE: *The defense counsel has read it. I will refer to it.*

MR. WISEMAN: *Your Honor, I object to that. It's not in evidence in this record, and furthermore——*

[504] MR. ZANE WHITE: *It is in the record because I read the question and answer to him and asked him if he stated that and he said he did.*

THE COURT: *Well, let's get on with the argument.*

MR. ZANE WHITE: When he was asked at Minnie's trial if there were threats of any kind made, he said the only thing, Minnie said, "Get him." He said there wasn't time for him to see anything, he said, "I didn't have time to see anything."

That's what he swore to under oath. Of course, I don't blame defense counsel, they both jumped up and started arguing. They could see what was coming.

Now for the first time, after this great lawyer from Illinois being over here, this defendant takes the stand and swears he saw a shiny object in Bobbie Gene Hopkins' hand.

Now of course by that time they knew of this crank, which the State put in evidence. We wasn't trying to hide that thing. We don't know how it got out there in the road.

Maybe one of those men had it and maybe he didn't, but this lawyer from Illinois knew that the defendant was accused of shooting a man who had done nothing, except **[505]** *say, "Who are you?"*

How are they going to try to claim that's justifiable homicide? I'll tell you how—by claiming they saw a shiny object which they thought was a gun, and they brought this poor boy who is under this accused man's jurisdiction and control and supervision, this child who is living in this home, they brought him in here and had him testify that Buster Harrison Farrell carried a shiny gun at all times.

Now why wasn't it Buster Farrell they said they saw the shiny object in his hand, if they thought they had it fixed up that Buster was supposed to be carrying it?

I will tell you why, because they wanted to get him to come clear on Bobbie Gene Hopkins charge too. That's why! That's why they put it in Bobbie's hands—that's why that poor boy got up here and testified.

I am not going to suggest this boy is lying. It's pitiful. It's shameful.

You have got the father; you have got the mother; you have got the two sons—all trying to clear this man by taking the stand.

I don't blame them. I don't know to what extent I would go if I was facing life imprisonment. I really don't look down on anybody that takes the stand and tries to warp the truth around his thumb to come clear.

[506] I have been Prosecutor long enough—and I don't know what I would do.

But that is something to consider, what the people who testified from the witness stand, what the evidence shows they have to gain or lose from your verdict, as to whether they are going to try to unfairly influence you or whether they are going to tell the truth or not.

Now, of course he tried to make quite a bit of hay out of the fact that the officer didn't testify as to what the charge filed was.

You heard me object to that and you heard the Court sustain my objection, and the reason for that is I decide what charge to file, not that police officer.

He makes the arrest. He knows there has been a wrongdoing and he makes the arrest and then brings that in to me and I file it. So that officer couldn't, he wouldn't know, he had arrested him the best he could for a killing or something like that—he doesn't know whether I am going to file some kind of manslaughter, assault with intent to kill, or what.

And I might file something entirely different than what he arrested him for. That happens a lot of times.

So that's no evidence of anything against these police officers, that they were lying. Not a thing in the world.

[507] Now, there was quite a few changes in previous testimony that indicated that somehow this thing had been gone over, this transcript had been gone over there at Carney Manor, and it was gone over at the Jail.

Of course they have got a right to do that. You heard the defense counsel say they did.

But the thing I have been screaming about is the changes in the testimony. For the first time, they started calling the two Highway Troopers liars, in this case, not in the prior one —in this one, after the man——

MR. JAY WHITE: Just a minute. I object to that. It's not in the evidence.

MR. ZANE WHITE: ——from Illinois comes over here.

MR. WISEMAN: Your Honor, I object to that.

MR. ZANE WHITE: Well, you argued it.

THE COURT: He has a right to respond to invited comment. Overruled.

MR. JAY WHITE: Your Honor, he's stating what happened in the other trial. It's not in evidence here. There wasn't nothing said about the Troopers in the other trial, that's surely not in evidence.

THE COURT: The Jury will disregard what was said about the Troopers in any other trial.

[508] MR. ZANE WHITE: The Trooper took the stand and gave his statement that he gave them at the time of the incident, and since this man from Illinois has come down here, he has changed a lot of things.

Now all of a sudden he's calling these men liars, these two Highway Troopers, in effect. He said, well, they are mistaken. But how can he be mistaken about something like that?

Either Trooper Myers arrested the defendant in the home of his mother or did not. Now, did he or didn't he?

If he did, and you believe he did, then you are going to have to discredit the defendant's testimony and find him guilty, be-

cause he was lying on the witness stand, perjuring himself right there.

We have got two Highway Troopers saying one thing on about 5 different points and the defendant, for the first time, is coming out with the idea that they are lying to try to convict him.

Now they have added these two troopers to their Minnies and Farrells and Hopkins to say all of these people were doing wrong to him, but this defendant, he's the kind of a man which has been exhibited, if things don't go to suit him, if he can't get everything to go his way, he becomes violent.

Now, how many people are you going to allow him **[509]** *to maim and kill and still believe that he is innocent?*

How many people—how many good citizens go along and get convicted of two acts of violence and two killings and the jury and the officers say, "That man couldn't be at fault, that's just a coincidence he's going around and doing all of these acts of violence."

THE COURT: *You have 3 minutes.*

MR. ZANE WHITE: *And you just believe him one time after another and he maims another one and he kills another one and maims another one and kills another one.*

How long can we allow a man to run free? I say put him away where the dogs can't bite him, where he can't do any more of that maiming and killing unless he does it to some of his own kind up in the Big House.

Give him two life terms and let's just get him out of the way to where we will be safe, because there is nobody can oppose this man, can oppose him, and be free from violence. That's his nature.

Now, of course they brought these business men in here from St. James to testify that as far as they knew he was a man of good reputation, prior to a certain date.

I tried to ask a question after that, properly, I presume, I was excluded from that as an improper question, because they limited their reputation to the prior date of this offense.

[510] *But Minnie was good enough for this man, and all of a sudden when he needs to raise an issue in this lawsuit to clear himself, why is he out blackening her up.*

Yet he wants the children—he is the kind of a man, he would fall in love with her and live with her all of the time and raise the children, then all of a sudden when she wants a property settlement or custody of the children or something like that, he's willing to turn on her viciously, which is another example of the type of man he is, and in spite of the fact that she is the mother of this man's children, he's willing to down her lower than the scum of the earth.

He don't care what this does to his children; he don't care what this does to Minnie, as long as he gets his way.

He's the kind of a man, he don't care if he maims his opposition, he don't care if he kills, as long as——

* * * * * * *

APPENDIX B

The Prosecutor then conducted his Cross-Examination of defendant's father in part as follows:

"Q. You are telling this Jury that all you did was walk in and get thrown out, I was very rude to you and told you if he came back I would throw Junior in jail and throw away the key, that's all you did?

A. You told Junior you would put him in jail and throw the damned key away.

Q. What did I say I was going to have him arrested for?

A. You didn't say. You talked about he didn't have no rights.

Q. I told him that Minnie had come in and complained about him twisting on her breasts and one thing and another, didn't I, and that I had advised her that if she didn't want to put up with that stuff to divorce him.

A. No, sir, like I said, you didn't have any discussion like that whatever when I was with him.

Q. I told him that I told her I thought the solution to that, to him and her's problem, was to go ahead and get the divorce and let the Court settle the problems, and he said he had been advised by an attorney to go around and take all of these pictures so he could knock her out of the property and the children.

A. You never said anything about that, no.

MR. WISEMAN: You Honor, now I object to the form of the cross-examination. He is testifying to facts and things, I don't think it's proper cross-examination. Any question about what was said, that's one thing, but he is making speech after speech about what he said, didn't I direct this question and didn't I direct that, and I think it's improper and I object.

MR. ZANE WHITE: Your Honor, Mr. Wiseman opened up the subject of the conversation that took place between myself and the witness and the defendant in the witness's presence and I am trying to clear that up because I don't think that the witness got a fair impression of what took place.

THE COURT: Both of you are making speeches to the Jury. Your objection is overruled. This is cross-examination. He can test his credibility and his memory. (T.259-260)

* * * * * * * *

"Q. Buster didn't bother you, did he? You all were the ones who always caused all of the trouble by following him around and taking pictures, weren't you?

A. No. He seemed to be the one that wanted to get rid of Junior, him and her together.

I think Junior wouldn't be even there when they would call us and threaten us.

Q. You heard me question him, didn't you—and you heard him tell me that he was following and taking pictures of Buster and Minnie and so on and I told him to quit doing that and that would end it and he said he had advice from his lawyer to do that so as to knock her out of the money and the children?

MR. WISEMAN: I object to all of this, Your Honor.

THE COURT: Well, you can ask him if he remembers that. Let's get on." (T.261)

Billie Gene McDowell testified that during the latter part of 1969, he saw Farrell and Minnie Gibson in a tavern and that Farrell said, with reference to the defendant, "we ought to kill the son-of-a-bitch." (T. 282)

Similarly, the defendant's mother, Fannie Gibson and son, Orville Gibson, testified concerning threats made by Farrell against defendant. (T. 294, 295, 324) However, with both Mrs. Fannie Gibson and Orville Gibson, the prosecuting attorney intensely cross-examined the witnesses regarding their interviews and trial preparation with defense counsel, implying that a "practice court" had been conducted. (T. 306-308, 325-327) Defense counsel moved for a mistrial based on such cross-examination and requested that the jury be appropriately instructed that witnesses have a right to talk with lawyers about their testimony in advance of trial. (T. 308) Both motions, as well as a similar instruction tendered at the conclusion of the evidence were denied. (T. 308)

Additionally, during the cross-examination of Mrs. Fannie Gibson, the following questions were asked by the Prosecutor:

"Q. Did Junior ever tell you, or did Minnie ever tell you that Junior was a Sadist and had to torture a woman before he could have his satisfaction sexually?

A. No, sir.

Q. And Minnie never did come to you and show you bruises and things where he had beat her up in order to have sexual orgasm, tortured her?

A. No.

Q. Were you aware that Minnie had come to the Prosecuting Attorney's Office and requested that your son be arrested for abusing her and torturing her?

A. No, sir.

Q. And were you aware that she was advised that if she didn't want to live with him, to divorce him, didn't want to put up with that kind of a man, to go ahead and leave him?

A. No.

Q. She didn't tell you anything like that?

A. No, sir.

Q. But you were advised that Junior then later came and wanted me to make Buster and Minnie and then let him follow them around and photograph them and that they couldn't object to it, he wanted me to try to do something like that, you are aware of that though, aren't you?

A. No.

Q. And that I told him I couldn't help him along that line, he would just have to leave Buster and then alone——" (T. 311, 312)

The defendant then testified regarding the background of his dispute with Farrell, who had been living with defendant's wife, Minnie. He stated that both Minnie and Farrell told him that

they were going to shoot him (T. 339), and that after he discussed the threats with the prosecutor he purchased a pistol for self protection. (T. 350)

On the night of the incident, he stated, he began following his wife and the two men and had decided to pass them and go home, when Farrell and Hopkins stopped him. (T. 360) He stated that Farrell and Hopkins advanced on him and that he saw a flash of something in Hopkins' hand which he thought was a gun. He stated that he then reached for his gun and began shooting. (T. 360) Defendant denied that he was advised of his rights at his parent's home at the time of his arrest. (T. 402)

During cross-examination, defendant admitted that he had been convicted for assault in Illinois, subsequent to the date of the shooting. The prosecutor then conducted his inquiry regarding Minnie Gibson as follows:

Q. Now, on the occasion of your separation—I believe you said it was about May 29, 1969, are you aware that Minnie came to my office on that occasion to have you arrested, and showed me proof of bruises?

A. Only what you told me.

Q. She was working down at that time at Meramec Springs, wasn't she?

A. No.

Q. Where was she working?

A. I don't know where. Prior to her leaving the home, she was working at Boys Town.

Q. Working at Boys Town. And prior to her leaving, did you go down and pick her up and hold a shotgun on her and take her over to your father and mother's home while they were out of town and hold her at gunpoint there

and twist on her breast and torture her and have sex with her?

A. I picked her up but I didn't hold her at gun point and I didn't torture her and I did not have sex with her.

* * * * * * *

Q. And did you strike her?

A. I slapped her.

Q. Did you slap her on the breast? Or as she said, "twisted on one of her bosoms?" (T.375, 376)

Thereafter, the Prosecutor conducted the following inquiry regarding the complaint which defendant had lodged with his office prior to the shooting incident:

"A. I believe I told you that the only thing I was trying to do was to get this evidence on this child custody.

Q. You told me you were going to go ahead and take Jay's advice, that you had obtained a gun and you thought you had the right to be in the road the same as they did and you had your rights to be in a tavern the same as they did, and you could take the photograph if you wanted to and if they didn't like it, you would have that gun to protect yourself with, didn't you?

A. No; I never made a statement like that, no.

Q. In sum and substance though didn't you make it? Not necessarily the exact words but wasn't that the effect of what you told me your intentions were?

A. No.

Q. But you had obtained a gun before you came to see me, hadn't you?

A. No, I don't think I had; no, sir.

Q. You are not sure though, are you, of the dates?

A. I am not sure of the exact date I came to see you but I know that it was before November.

Q. Well, you know I didn't file a complaint on you when Minnie come and complained on you, don't you? Didn't I tell you that?

A. Yes.

Q. And told you you would have to cut that stuff out or I would let her sign a complaint on you? I told you that, didn't I?

A. Well, you told me if I came back complaining any more that you were going to stick me in jail, you didn't know on what charge, but you were going to have me locked up.

Q. Well, aren't you confused on that? Didn't I tell you that if Minnie came back and made further complaint about you torturing her and holding a gun on her and everything that I would have to have you put in jail? Wasn't that what I told you?